

MTGLQ v Taylor
2022 NY Slip Op 33164(U)
September 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 521668/18
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of May 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS,
A.J.S.C.

Index No.: 521668/18

MS # 2 + 3

MTGLQ,

Plaintiff,

DECISION AND ORDER

-against-

MARC TAYLOR et al,

Defendant,

2022 SEP 16 AM 9:26

KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	Numbered
Motion (MS 2)	<u>1</u>
Opposition/Cross (MS 3)	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced on October 26, 2018. Defendant Taylor answered, asserting eighteen affirmative defenses, two counterclaims, and a cross-claim against co-defendant RRA CP Opportunity Trust I. On December 10, 2020, Defendant filed the instant motion for summary judgment dismissing Plaintiff's claims as untimely and discharging the liens held by Plaintiff and RRA pursuant to his counter- and cross-claims. Plaintiff cross-moved for summary judgment and an order of reference. Defendant opposed, asserting a variety of additional defenses. RRA remains in default and did not oppose the motions.

"The law is well settled that with respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). The prior action was commenced on December 18, 2009, accelerating the lien. The instant action was not filed until October 26, 2018, nearly nine years later. As such, Defendants have met their initial burden of showing that the instant action is untimely. The burden then shifted to Plaintiff to demonstrate that the prior action was not an acceleration or any other basis for the instant action to be timely (*U.S. Bank Nat. Ass'n v. Martin*, 144 A.D.3d 891 [2d Dept 2016]).

Plaintiff's counsel speculates that "upon review of the Payment History for the loan **it appears** that a payment **may** have been made on June 26, 2018 in the amount of \$20,675.53" [emphasis added]. The proffered client affidavit does not mention this payment and there is no evidence of such transaction in the record. No explanation has been offered for the "Trans" and "Process" codes associated with it. Counsel nonetheless suggests that his proposed possible reading of the document is sufficient to create an issue of fact.

Defendant accurately notes that the line item relied upon by counsel is labeled "Balance Adjust" and that the "funds" were (apparently) applied solely to the principal rather than arrears – which would be atypical of a mortgage payment, particularly when the loan is in default. Defendant also swears that he "did not make any payment on June 26, 2018 or any subsequent date."

"In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was 'accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" (*Martin*, 144 AD3d at 892-893 [citations omitted]). Plaintiff's speculation that Defendant made a payment is insufficient to meet such burden.

In light of the foregoing, the Court finds that the instant action was filed beyond the applicable statute of limitations.

“To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title, such as in a deed or other instrument, that is actually invalid or inoperative” (*Acocella v Wells Fargo Bank, N.A.*, 139 AD3d 647 [2d Dept 2016]). Pursuant to a recorded deed, Defendant is the owner of real property upon which Plaintiff has a lien. As the Court has determined that the statute of limitations has passed on the lien and that it is thus unenforceable, judgment is granted in favor of the counterclaimant upon the quiet title counterclaim.

While Defendant has demonstrated that RRA has a recorded lien on the property in suit, he fails to demonstrate that it was previously accelerated, relying on an “acceleration letter” that is not before the Court. As such, he has not met his burden of demonstrating that its lien is unenforceable. Default judgment on the cross-claim is, thus, denied.

RPL §282 provides that “[w]henever a covenant contained in a mortgage on residential real property shall provide that in any action or proceeding to foreclose the mortgage that the mortgagee may recover attorneys’ fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage, or that amounts paid by the mortgagee therefor shall be paid by the mortgagor as additional payment, there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys’ fees and/or expenses incurred by the mortgagor . . . in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the mortgagee or by way of counterclaim in any action or proceeding commenced by the mortgagee against the mortgagor.” Herein, the subject mortgage provides for the holder to recover legal fees. Consequently, the same may be recovered by Defendant, the victorious party.

Defendant’s motion is granted to the extent that summary judgment is granted in his favor on Plaintiff’s claims and his counterclaims. Default judgment on his cross-claim is denied. Plaintiff’s cross-motion for summary judgment is denied.

Defendant to serve an attorney fees affirmation (with supporting documentation) and

settle an order on notice (both) within 30 days of entry of the instant order.

This constitutes the decision and order of the Court.

ENTER:



Hon. Cenceria P. Edwards, A.J.S.C.

9/13/2022

A.S.C.J. Cenceria P. Edwards

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